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No.

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIS SARGENT, WARDEN,
ARKANSAS DEPARTMENT OF CORRECTION
PETITIONER

v.

WILBURN A. HENDERSON
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DETERMINATION REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT IS CORRECT?

PARTIES

The parties to this proceeding are Willis Sargent, Warden, Arkansas Department of Correction, Petitioner, and Wilburn A. Henderson, who is an inmate on death row in the Arkansas Department of Correction, Respondent. Petitioner files this petition for writ of certiorari to the United States Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Willis Sargent, the petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

On appeal from the District Court, the Eighth Circuit Court of Appeals opinion is reported in *Henderson v. Sargent*, 926 F. 2d 706 (8th Cir. 1991). The opinion of the court is reprinted in slip opinion form in Appendix A. Petition for rehearing was denied in two parts. *Henderson v. Sargent*, 939 F. 2d 586 (8th Cir. 1991); *Henderson v. Sargent*, ___ F. 2d ___ (Case. No. 90-1550EA, 8th Cir. August 23, 1991). The Eighth Circuit Court of Appeals Orders denying rehearing are reprinted in slip opinion form in Appendix B and C. The opinion of the District Court was announced from the bench and is unreported. Excerpted portions of the District Court's Opinion and the judgment are reprinted in Appendix D.

JURISDICTIONAL STATEMENT

Petitioner asserts that this Court has discretionary jurisdiction to review this case pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Respondent was convicted by a jury in Sebastian County (Arkansas) Circuit Court of capital murder for the robbery and shooting death of Willa Dean O'Neal, who was a store clerk at a used furniture store in Fort Smith, Arkansas. Respondent was identified by a piece of evidence that was found at the scene of the robbery and shooting. Respondent confessed to being at the store when the robbery and shooting occurred but denied that he did the killing. Respondent also could not account for his whereabouts on the day of the robbery and the killing of the store clerk. He tried to conceal his identity after the killing and eventually fled the state to Texas where he was arrested. The jury heard this testimony at the guilt phase of the bifurcated trial and then heard mitigation as well as aggravation evidence at the penalty phase and imposed the death penalty.

Respondent appealed his conviction to the Supreme Court of Arkansas, which affirmed the conviction. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, *cert. denied*, 464 U.S. 1012 (1983). His petition for post-conviction relief was also denied by the Arkansas Supreme Court. *Henderson v. State*, 281 Ark. 406, 664 S.W.2d 451 (1984). Henderson then filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Arkansas. After a preliminary appeal to the Eighth Circuit Court of Appeals concerning appointment of counsel, and an evidentiary hearing, Henderson was granted relief as to ineffective assistance of counsel. Petitioner appealed that decision to the Eighth Circuit Court of Appeals which affirmed the granting of habeas corpus relief.

Petitioner seeks review on certiorari from that decision.

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT COURT OF APPEALS DETERMINATION REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT IS INCORRECT.

Henderson alleged in his habeas petition that his trial attorney was ineffective for failing to investigate and present evidence concerning other suspects. Petitioner asserted Henderson had procedurally defaulted as to this claim because it was not presented in his post-conviction petition to the Arkansas courts. The District Court granted relief as to the guilt phase and ordered a new trial because it found the trial attorney was ineffective for failing to present this 'other suspect' evidence. The Eighth Circuit Court of Appeals found that Henderson was actually innocent of the crime of capital murder and thus excused his failure to raise in his post-conviction petition this claim of ineffective assistance of trial counsel. Petitioner asserts that the Eighth Circuit Court of Appeals decision in this case concerning actual innocence is directly opposite to this Court's decisions and is in conflict with other Circuit Courts of Appeals on this issue.

Henderson asserted in his habeas corpus proceeding before the District Court that he was denied effective assistance of counsel at the guilt phase and the penalty phase of his capital murder trial. He alleged that his trial attorney should have presented evidence concerning other suspects in the case to the jury at the guilt phase. He also alleged that the attorney should have presented evidence of his prior mental history at the penalty phase of the trial in mitigation. Petitioner here asserted a procedural default because the claim regarding other suspects had never

been presented to the state court.

Henderson asserted as cause that he received ineffective assistance of counsel at the post-conviction level in state court. This claim has been found by this Court to not be cause for procedural default. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2456 (1991).

However, the Eighth Circuit Court of Appeals then found that Henderson had overcome the procedural default because he was 'actually innocent.' *Henderson v. Sargent*, 926 F. 2d 706 (8th Cir. 1991). Petitioner takes issue with the definition and standard concerning 'actually innocent' set out by the Eighth Circuit Court of Appeals. The standard has been stated that the actual innocence exception applies where the defendant on retrial would probably be acquitted. However, the standard as applied by the Eighth Circuit has not followed the standard as contemplated by this Court when this exception to the cause and prejudice standard was announced.

This Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Smith v. Murray*, 477 U.S. 527, 537 (1986). In *Smith v. Murray*, *supra*, this Court stated in announcing the concept of 'actual innocence', that it was very different from the concept of 'legal innocence'. It appears from the case at bar that the standard applied by the Eighth Circuit does not meet the strict standard announced in *Smith v. Murray*, *supra*. Henderson indeed may have a legal claim to put before the jury but that in no way meets the standard as announced.

In the present case, the victim was shot in her store

during the middle of the day. Her husband, daughter and son-in-law had just left the store shortly before the murder. After the murder, a piece of paper in Henderson's handwriting was found near the victim. The victim was shot with a pistol, the same type of pistol which Henderson had removed from a pawn shop a few days before the murder and returned to the pawn shop shortly after the murder before he fled to Houston, Texas. Some visitors in Henderson's home testified that he tried to change his appearance right after the murder and tried to get them to cover up his whereabouts on the day of the murder. While in custody in Houston, Henderson confessed to being at the store on the day of the murder but denied that he actually did the killing. The defense argued at trial, that Henderson could not possibly have been in Fort Smith, Arkansas, at the time of the murder because he lived in Springdale, Arkansas, over 50 miles away and was seen there shortly before the murder occurred. Based upon the distance, weather, and condition of his van on the day of the murder, the defense argued that Henderson could not have been the killer. This was rejected by the jury.

The claim now is that his attorney was ineffective for not presentings evidence of other suspects which the police were investigating as possible killers before Henderson was arrested in Houston and confessed to being at the store. Most of those suspects were well known to the police and were easily checked. The references to them were in the police files and the defense attorney knew of these other suspects. He did not pursue the issue, however, because he felt the better defense was the one presented.

There was also an allegation which arose for the first time at Henderson's habeas corpus that the victim's husband may have been a suspect in the murder. This also was available to the defense attorney as well as the

prosecutor and police, but nothing could be shown even at the habeas hearing that could connect the husband to the murder.

In deciding actual innocence, the Eighth Circuit in this case found that, because this evidence (the claim of other suspect evidence) was not presented by the defense attorney, Henderson is actually innocent of the crime. This is where the flaw in the application by the Eighth Circuit is made. The court used the prejudice prong of the *Stickland v. Washington*, 466 U.S. 668 (1984) standard of the ineffective assistance claim itself to decide Henderson's actual innocence. This is clearly not what the test of actual innocence is about.

In *Bliss v. Lockhart*, 891 F. 2d 1335 (8th Cir. 1989), the Eighth Circuit stated that the defendant was actually innocent because of a defense of duress would be available to her but not presented at either of her first two trials. This does not meet the standard as set out by this Court. While this may be legal innocence, it is not actual innocence. Further, in *Mercer v. Armontrout*, 864 F. 2d 1429 (8th Cir. 1988), *stay denied*, 488 U.S. 998 (1989), the Eighth Circuit reached a procedurally defaulted claim because of the 'manifest injustice' exception. That standard was used because Chief Judge Lay indicated that as a death penalty case, it warranted review. Chief Judge Lay is also the author of the opinion in *Henderson v. Sargent*, *supra*.

Even the Eighth Circuit stated that a case must be an extraordinary one before a federal habeas court can find actual innocence as an exception to the finding of cause and prejudice. *Henderson v. Sargent*, *supra*, quoting *Murray v. Carrier*, *supra*; *Dugger v. Adams*, 489 U.S. 401 (1989). It appears from the standard announced now by the Eighth Circuit that it is even less than the cause and

prejudice standard because it seems to be satisfied by just the prejudice part of the *Strickland* standard. Petitioner asserts this is not what this Court has indicated about actual innocence. According to the standard applied in this case by the Eighth Circuit, if the defendant can show within a reasonable probability that a different result would be reached if the action had been taken, then the Eighth Circuit will reach the merits of the issue based upon his actual innocence. Petitioner asserts that this is not the standard as contemplated by this Court when it decided *Smith v. Murray* and *Murray v. Carrier*. It appears that the Eighth Circuit has done just what this Court rejected in *Smith v. Murray*, 477 U.S. at 538. The Eighth Circuit's standard seems to be one of mere 'fundamental fairness.' Petitioner respectfully requests that this Court review the standard of 'actual innocence' and follow the dictates of the previous cases of this Court in finding that the Eighth Circuit's standard here is in error.

Some of the reasoning of *Mercer v. Armontrout*, *supra*, has been questioned, by the Eighth Circuit in *Smith v. Armontrout*, 888 F. 2d 530 (8th Cir. 1989), *stay denied*, ___ U.S. ___, 110 S.Ct. 830 (1990) and *Fairchild v. Lockhart*, 900 F. 2d 1292 (8th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 20 (1990). However, even though the correct language was used in the present case by Chief Judge Lay, the result is that the Eighth Circuit in this case has not followed the guidance and dictates of this Court or the opinions of its own cases. This is evident by *Bliss v. Lockhart*, *supra*, and *Jones v. State of Arkansas*, 929 F. 2d 375 (8th Cir. 1991). The most shocking example is the holding in *Pilchak v. Camper*, 935 F. 2d 145 (8th Cir. 1991). In that case the Eighth Circuit held that because the case was 'unusual' it was not going to reach a decision regarding cause and prejudice. *Id.* at 148. The court reasoned that sometimes justice requires a more expansive and compassionate application of the rules and addressed the

claim which resulted in relief being granted. Upon a reading of that opinion it is clear that what troubled the Eighth Circuit was the fact that the defendant's boyfriend had received a lighter sentence than she did. This does not comport with this Court's opinion's regarding excuses for procedural default.

Petitioner asserts that this Court has specifically rejected 'fundamental fairness' as being the same as 'actual innocence' and thus the Eighth Circuit's decisions which so reflect that are in direct conflict with this Court's decisions. *Smith v. Murray*, 477 U.S. at 538.

The clear meaning of *Murray v. Carrier, supra*, is that the cause and prejudice test of *Wainwright v. Sykes*, 433 U.S. 72 (1977) and *Engle v. Isaac*, 456 U.S. 107 (1982), is to be upheld in the context of collateral attacks such as federal habeas corpus. No amount of 'prejudice' absent a sufficient showing of cause should be permitted to excuse a deliberate procedural default such as the one in this case. This Court rejected in no uncertain terms the notion that a showing of prejudice can suffice, in and of itself, to overcome a procedural default. *See also Dugger v. Adams*, 489 U.S. 401 (1989).

In the analysis that the Eighth Circuit used in reaching the actual innocence exception in this case, it is clear that the court relied solely upon the prejudice prong of the claim itself (ineffective assistance of counsel) in deciding whether Henderson was actually innocent of the crime. This is certainly not what this Court has stated should be done.

Even though the Eighth Circuit noted that a case must be an extraordinary one before the federal habeas court can find actual innocence, it none-the-less applied that standard in the present case which is wholly unremarkable.

Henderson v. Sargent, 926 F. 2d at 713, quoting *Murray v. Carrier, supra*; *Dugger v. Adams, supra*.

In *Smith v. Murray, supra*, this Court, in discussing the fundamental miscarriage of justice as opposed to the actual innocence standard, noted that where the defendant does not challenge the veracity of the evidence that was presented but challenges the method in which this evidence was presented, he has not shown actual innocence of the death sentence. 477 U.S. at 538. In *Dugger v. Adams*, 489 U.S. 401 (1989), this Court upheld a procedural bar to a claim and restricted the cases to which this exception to the procedural default doctrine should be applied. In that case, the majority held that a defendant must do more than merely argue that the alleged constitutional error by its very nature might have affected the accuracy of the death sentence; rather, the petitioner must demonstrate that he or she "probably is 'actually innocent' of the sentence he or she received." 489 U.S. ___, 109 S.Ct. at 1217.

Petitioner also points this Court to several other circuit court of appeal decisions which have attempted to apply the language from *Smith v. Murray, supra*, and *Murray v. Carrier, supra*, in formulating a test for actual innocence. Even when the Eleventh Circuit Court of Appeals was trying to formulate a test in *Johnson v. Dugger*, 911 F. 2d 440 (11th Cir. 1990), that court had a difficult time deciding exactly what standard to apply and what definition for "probably" should be used. *See also Clark v. Dugger*, 901 F. 2d 908 (11th Cir. 1990); *Aldridge v. Dugger*, 925 F. 2d 1320 (11th Cir. 1991).

In *Coleman v. O'Leary*, 845 F. 2d 696 (7th Cir. 1988), the court held, in applying the actual innocence exception to the procedural default bar, that because there was overwhelming evidence of guilt then the error was not so

crucial to the ultimate question of guilt or innocence. If this is the test to be applied then certainly, respondent cannot be actually innocent of this crime here.

In *Ewing v. McMackin*, 799 F. 2d 1143 (6th Cir. 1986), the court decided that the test centered on whether the petitioner was actually, as opposed to legally, innocent of the crime. In *Gardner v. Ponte*, 817 F. 2d 183 (1st Cir. 1987), that court applied an overwhelming evidence of guilt analysis to decide whether petitioner was actually innocent of the crime.

In *Deutscher v. Whitley*, ___ F. 2d ___ (Case No. 88-2552, 88-2579, 9th Cir. October 15, 1991), that Court of Appeals noted that the Eighth and Eleventh Circuit Courts of Appeals have reached different results in trying to apply this test. This is further evidence that the Eighth Circuit has misapplied the standard announced by this Court as to actual innocence.

Petitioner points these cases out to show that the test gleaned from *Murray v. Carrier* and *Smith v. Murray*, are not consistent as applied by the circuit courts of appeal. If petitioner was in another circuit he asserts that he could show that respondent is not actually innocent of this crime. Further, petitioner also asserts that under the analysis applied by the Eighth Circuit Court of Appeals in some of its own cases discussed above, he could make such a showing. The varied analysis of the Eighth Circuit is in direct conflict with this Court's decisions. Thus there is inconsistent opinions among the circuits and inconsistent opinions between cases of the Eighth Circuit.

Based upon the foregoing, petitioner respectfully submits that this petition should be granted.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court state that review on writ of certiorari will be granted when there are special and important reasons therefor. This case presents issues worthy of such review. Petitioner respectfully submits that the Eighth Circuit United States Court of Appeals' holding that actual innocence is met in this case does not follow the applicable decisions of this Court or the other circuit court of appeals and has been improperly applied in respondent's case. Thus, based upon the foregoing citations of authority, petitioner respectfully prays that this Court grant review on writ of certiorari.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1550

Wilburn A. Henderson, Appellee,	*	
	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Arkansas.
Willis Sargent, Warden, Arkansas Department of Correction,	*	
	*	
	*	
Appellant.	*	

Submitted: October 26, 1990
Filed: February 19, 1991

Before LAY, Chief Judge, Henley, Senior Circuit Judge, and McMillian, Circuit Judge.

LAY, Chief Judge.

The State of Arkansas appeals the district court's[1] order granting a writ of habeas corpus. The petitioner,

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[1]The Honorable United States District Judge G. Thomas Eisele, Chief Judge for the Eastern District of Arkansas.

Wilburn Henderson, challenges his conviction for capital murder on the grounds that his trial counsel was ineffective in both the guilt and penalty phases of his trial. The court found that trial counsel failed to investigate and develop evidence implicating other suspects in the murder. This evidence, available to counsel at the time of trial, creates significant doubt about Henderson's guilt. The court also found that trial counsel failed to present mitigating evidence in the penalty phase of the trial that indicated Henderson had suffered from mental illness and possibly was not in complete control of his actions when he evaded police and confessed to witnessing the murder. The district court ordered the state to either retry Henderson or release him. We affirm with regard to the guilt phase claim, and therefore do not reach the penalty phase claim.

I.

Henderson was convicted of the capital murder of Willa Dean O'Neal on February 2, 1982, and was sentenced to death.[2] His first trial was declared a mistrial when several jurors admitted they had seen the extensive media publicity about the case. At the second trial, the prosecution presented evidence showing that the victim

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[2]Henderson brought an unsuccessful direct appeal to the Arkansas Supreme Court challenging the sufficiency of evidence, constitutionality of the Arkansas death penalty statute, and various evidentiary rulings. *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26, *cert. denied*, 464 U.S. 1012 (1983). Henderson then brought a Rule 37 petition arguing that his trial counsel was ineffective in failing to (1) request a jury instruction for first-degree murder, (2) submit evidence of Henderson's impaired mental condition during the penalty phase, and (3) object to cross-examination of defense witnesses during the penalty phase. The Arkansas Supreme Court denied the Rule 37 petition. *Henderson v. State*, 281 Ark. 406, 664 S.W.2d 451 (1984). Henderson then brought his petition for a writ of habeas corpus to the district court.

was found shot to death behind the counter of the furniture store she owned and operated with her husband. The police established she was murdered between 1:40 p.m., when her husband Bob O'Neal, daughter Glenda Fleetwood, and son-in-law Ricky Fleetwood last saw her, and approximately 2:00 p.m., when a mail carrier and several customers discovered the body. The cash register was found open and at least $41 was missing.

A key piece of evidence implicating Henderson was a folded sheet of yellow paper found on the floor of the furniture store.[3] The victim's daughter testified she had not seen the paper there earlier in the day. On the paper were two telephone numbers, the name of a real estate agent, and a description of a lake cabin. Police contacted the real estate agent who stated Henderson had made an appointment to discuss the lake cabin described on the sheet of paper. Henderson did not keep the appointment. This paper was the sole physical evidence connecting Henderson with the scene of the murder.

Henderson, aware he was a suspect, fled to Houston where he was arrested by Houston police. Police by then had discovered that Henderson had taken a .22 caliber pistol out of pawn a few days before the murder, and had returned it after the murder. Ballistics evidence at trial indicated O'Neal was killed by a .22 caliber pistol, but the ballistics expert could not conclusively match the bullet to Henderson's gun.

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[3]Testimony at the evidentiary hearing before the district court indicated that two sheets of paper were found, one by police on the day of the murder and one by Clarence Wilson, a store employee, the next day. [T. 62] The sheet of paper found by police was traced to Henderson. It is unclear whether police ever determined the origin of the sheet of paper discovered by Clarence Wilson.

Arkansas police traveled to Houston to question Henderson, who confessed he was at the murder scene and claimed he had seen Ollie Brown kill O'Neal. Henderson later recanted the confession and stated he confessed only because he feared the police would harm him. At trial, Henderson testified that he was in Springdale, Arkansas at 12:00 noon the day of the murder and could not possibly have driven to the murder site in Fort Smith in time to commit the murder. His alibi was corroborated by Selena Henderson, his wife at the time, who claimed to have been with him in Springdale on that day. Henderson explained that he must have dropped the yellow sheet of paper when he was shopping in the O'Neal's store a few days before the murder.

Based on this evidence the jury found Henderson guilty of the murder. At the penalty phase, Henderson's mother testified that he was a loving son, and another witness testified that he had been doing good Christian work while in jail. Defense counsel presented no other mitigating evidence. The jury sentenced him to death.

II.

A.

In considering Henderson's petition, the district court first considered whether Henderson had procedurally preserved his claims of ineffective assistance of counsel under *Murray v. Carrier*, 477 U.S. 478 (1986) and *Wainwright v. Sykes*, 433 U.S. 72 (1977). The state concedes Henderson raised his claim of ineffectiveness of counsel with regard to the penalty phase in his Rule 37

petition.[4] Thus, the issue of procedural bar relates only to Henderson's claim of ineffectiveness of counsel during the guilt phase.

The district court analyzed the question whether Henderson's guilt phase claim was procedurally barred under the test established in *Smittie v. Lockhart*, 843 F. 2d 295, 296 (8th Cir. 1988).[5] The court first found that

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[4]The federal district court described trial counsel's performance at the penalty phase as follows:

> The trial record of the penalty phase of the petitioner's trial does not reflect the thoughtful and careful preparation that the law requires. Perfunctory is the only word that I think adequately can describe it.
>
> The Court finds and concludes that petitioner's attorney was ineffective at the penalty phase in not adequately investigating, developing and presenting evidence concerning petitioner's mental illness history at the penalty phase of the trial and in not adequately explaining and challenging those prior convictions of the petitioner which the State relied upon as aggravating circumstances.

Henderson v. Sargent, No. PB-C-84-151 at 458 (Mar. 5, 1990) (record of proceedings).

[5]The *Smittie* court established the following analysis:

> Federal courts must conduct a four-step analysis to determine whether a petition may be considered when its claims have not been presented to a state court. First, the court must determine if the petitioner fairly presented "the federal constitutional dimensions of his federal habeas corpus claim to the state courts." If not, the federal court must determine if the exhaustion requirement has nonetheless been met because there are no "currently available, non-futile state remedies," through which the petitioner can present his claim. If a state remedy does not exist, the court next determines whether the petitioner has demonstrated "adequate cause to excuse the failure to raise the claim in state court properly." If the petitioner can show sufficient cause, the final step is to determine whether he has shown "actual prejudice to his defense resulting from the state court's failure to address the merits of the claim." The petition must be dismissed unless the petitioner succeeds at each stage of the analysis.

Smittie, 843 F. 2d at 296 (citations omitted).

Henderson did not raise his guilt phase claim before the state court. [T. 459] Henderson met the exhaustion requirement, however, because there were no non-futile state remedies available to him. [T. 460] Rule 37.2 of the Arkansas Rules of Criminal Procedure requires Henderson to bring any claim for collateral review of his conviction "within three (3) years of the date of commitment, unless the ground for relief would render the judgment of conviction absolutely void." The types of claims that would render a conviction void are very limited, and none are raised here. *See Smittie*, 843 F. 2d at 297-98. Thus, the district court correctly found that Henderson could not bring another petition under this rule, as the petition would be time-barred.

Before moving past the exhaustion requirement to cause and prejudice, we note that the Supreme Court "generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for procedural default." *Carrier*, 477 U.S. at 489; *see also Leggins v. Lockhart*, 822 F. 2d 764, 768 n.5 (8th Cir. 1987), *cert. denied*, 485 U.S. 907 (1988). Because Henderson alleges as cause the ineffectiveness of counsel in a state collateral proceeding, the state conceded at oral argument that there is no forum for review of this claim in state court. Arkansas rules prohibit a rehearing or successive petition in state collateral proceedings unless the first petition was specifically dismissed without prejudice. Ark. R. Crim. P. 37.2 (b), (d); *Grooms v. State*, 293 Ark. 358, 737 S.W.2d 648, 649 (1987); *Williams v. State*, 273 Ark. 315, 619 S.W.2d 628, 629 (1981). Because Henderson's Rule 37 petition was not dismissed without prejudice, we find he substantially complied with the requirement to present this claim to the state courts.

Having met the exhaustion requirement, Henderson

must show sufficient cause for not bringing his guilt phase claim before the state court. The district court found cause in the ineffectiveness of Henderson's counsel in Henderson's state collateral challenge to his conviction brought under Rule 37 (Rule 37 counsel). [T. 460] In *Carrier*, the Supreme Court held that ineffectiveness of counsel can constitute cause. 477 U.S. at 488, 497. Although the Supreme Court has "declined . . . to essay a comprehensive catalog of the circumstances that would justify a finding of cause," *Smith v. Murray*, 477 U.S. 527, 533-34 (1986), this court has determined that ineffectiveness of counsel in a state collateral proceeding can constitute cause. *See Simmons v. Lockhart*, 915 F. 2d 372, 376 (8th Cir. 1990); *Bliss v. Lockhart*, 891 F. 2d 1335, 1339 (8th Cir. 1989); *Stokes v. Armontrout*, 851 F. 2d 1085, 1092 n.8 (8th Cir.), *cert. denied*, 488 U.S. 1019 (1988).[6] Ineffectiveness of appellate counsel is measured under the standard set out in *Strickland v. Washington*, 466 U.S. 688, 690 (1984).[7] *Bell v. Lockhart*, 795 F. 2d 655, 657 (8th Cir. 1986).

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[6]The Fourth, Seventh, and Eleventh Circuits have addressed this issue. The Fourth Circuit has held that ineffectiveness of post-conviction counsel cannot constitute cause. *Coleman v. Thompson*, 895 F. 2d 139, 144 (4th Cir.), *cert. granted in part*, 111 S.Ct. 340 (1990). The Seventh Circuit has in dicta expressed varying views. *Compare Madyun v. Young*, 852 F. 2d 1029, 1033 n.2 (7th Cir. 1988) (ineffectiveness of counsel in collateral proceeding may constitute cause) *and Morrison v. Duckworth*, 898 F. 2d 1298, 1301 (7th Cir. 1990) (might constitute cause) *with Buelow v. Dickey*, 847 F. 2d 420, 426 (7th Cir.), *cert. denied*, 489 U.S. 1032 (1988) *and Prihoda v. McCaughtry*, 910 F. 2d 1379, 1386 (7th Cir.) (cannot constitute cause). The Eleventh Circuit hold that ineffective assistance in a collateral proceeding cannot constitute cause, but that decision has been vacated and rehearing in banc has been granted. *Toles v. Jones*, 888 F. 2d 95, 99-100 (11th Cir.) (per curiam), *vacated pending rehearing in banc*, 905 F. 2d 346 (1990); *see also Johnson v. Dugger*, 911 F. 2d 440, 458 (11th Cir.), *vacated pending rehearing in banc*, 920 F. 2d 721 (1990).

[7]We recognize that Henderson's claim of ineffectiveness of post-conviction counsel may constitute cause for surmounting the procedural bar, but cannot constitute grounds for relief from his conviction because Henderson has no Sixth Amendment right to counsel in a state collateral proceeding. *See Simmons*, 915 F. 2d at 376. The *Simmons* court analyzed ineffectiveness of post-conviction counsel under the *Strickland* standard, and we find use of that standard logical.

Under *Strickland*, ineffectiveness of counsel is proven when the defendant can show that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. Although a court must endeavor to avoid "the distorting effects of hindsight," *id.* at 689, its ultimate inquiry must be to determine "whether counsel's assistance was reasonable considering all the circumstances," *id.* at 688. Specifically, the defendant must show that counsel's performance fell below an "objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

The district court found Henderson's trial counsel and Rule 37 counsel ineffective after hearing testimony that cast significant doubt about whether Henderson was rightly convicted. This testimony, which was not presented in any of Henderson's previous trials or appeals, demonstrated that at least three other persons, particularly Bob O'Neal, had motive, opportunity and ability to kill Willa Dean O'Neal.

The record demonstrated that the victim wanted a divorce from Bob O'Neal, and Mr. O'Neal was "mad" about it. [T. 36] The victim told Glenda Fleetwood that Bob had been threatening her about the divorce. [T. 37] He allegedly stated that if the victim divorced him "he'd make sure no other man ever had her." [T. 37] Bob O'Neal had been intimately involved with one Ruby Kiser. [T. 39] His wife had filed an alienation of affection suit against Ms. Kiser. [T. 15] Bob O'Neal was the beneficiary of his wife's life insurance policy and took substantial property under her will. [T. 20-21, 40] He had a violent temper and

previously had broken Ruby Kiser's jaw. [T. 215, 240-41] He was mentally unstable and ultimately was committed to a mental treatment center. [T. 355-56] He owned a .22 caliber pistol identical to the gun submitted by the state as the murder weapon. [T. 23] He claimed his gun was stolen sometime after the murder. *Id.*

The district court heard testimony from Glenda Fleetwood, the victim's daughter. On the day of the murder, contrary to their usual routine, O'Neal insisted that Glenda work with him rather than stay at the store with her mother. [T. 43] The morning before the murder, O'Neal for the first time ask Glenda where her mother wanted to be buried. [T. 41] They returned to the store around noon that day, and left at about 1:40 p.m. [T. 42] As they were leaving, Bob O'Neal told Glenda and her husband to stay out in the truck while he went back into the store for a few minutes. *Id.* The three then left, but as soon as they reached their destination, O'Neal sent Glenda back to the store for root beer so he could take his medicine. [T. 44] When she returned with soft drinks she obtained somewhere else, O'Neal insisted that she go back to the furniture store to get some electrical tape. *Id.* Glenda returned to the store and discovered her mother's body. *Id.* When Glenda returned from the murder scene with the police, O'Neal exclaimed without being told what happened: "Someone has robbed and killed my -- murdered my wife!" [T. 13] O'Neal himself testified before the district court that he made this statement, but never provided a satisfactory explanation. *Id.* Later, Bob O'Neal wrote to stated officials, insisting Henderson was not the murderer[8] [T. 358] The district court also heard testimony

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[8]Although not discoverable by trial counsel, Bob O'Neal made one other inculpatory statement while watching the coroner testify at Henderson's trial. The coroner was testifying that the victim had been sitting at the time she was shot. Bob O'Neal turned to Mr. Hudspeth, sitting next to him, and said "No, that's not the way it was. She dove out of the chair to miss the bullet." [T. 69] This statement has never been explained by the state. Rule 37 counsel could have discovered the statement.

concerning four other possible suspects.[9]

None of this testimony was presented by defense counsel at trial, who maintained an alibi defense that was diminished considerably by Henderson's recanted statement that he was at the scene. It is not by virtue of hindsight that the district court found trial counsel reasonably could have presented evidence implicating O'Neal in the murder. Pursuing such a theory would have been entirely consistent with Henderson's alibi defense, and the evidence against Bob O'Neal was substantial.

Counsel's decision not to investigate and pursue this evidence cannot be justified as a strategic decision.[10] This court has held that "[t]he decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial." *Chambers v. Armontrout*, 907 F. 2d 825, 828 (8th Cir.) (en banc), *cert. denied*, 111 S.Ct. 369 (1990). Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories. Counsel has "a duty . . . to investigate all witnesses who allegedly possessed knowledge concerning [the

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[9]John Hysell knew the victim and was said to be capable of murder. [T. 167] Although Hysell lived in Kansas, he apparently robbed a store in Kansas and was seen in Fort Smith pawning coins two days after the murder. [T. 166] Harry Anderson, a man with a criminal history and known to carry guns, was seen loitering "nervously" across the street from the store on the day of the murder. [T. 162-64] Ollie Brown, the man named as the murderer by Henderson in his recanted statement to police, and Ruby Kiser, the defendant in the victim's lawsuit, also were possible suspects.

[10]*Cf. Simmons*, 915 F. 2d at 377 (stating that "[a conflict of interest claim] should rarely be abandones, and [is] not the kind of claim . . . that can, in normal circumstance, reasonably be winnowed out in the process of selecting grounds counsel believes to be most promising").

defendant's] guilt or innocence." *Lawrence v. Armontrout*, 900 F. 2d 127, 130 (8th Cir. 1990). We have stated that "'[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty.'" *Eldridge v. Atkins*, 665 F. 2d 228, 232 (8th Cir. 1981) (quoting American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function §4.1 (Approved Draft 1971)), *cert. denied*, 456 U.S. 910 (1982).

There is no reasonable professional judgment that would support trial counsel's failure to investigate these witnesses. Counsel admitted he did not investigate or develop evidence about any of these possible suspects. [T. 153-71] Indeed, trial counsel admitted he never interviewed the family of the victim, even though he was presented with information from the police that Bob O'Neal was capable of committing the murder. [T. 162] Counsel did not interview Glenda Fleetwood, Ricky Fleetwood or Bob O'Neal, even though they were among the last to see the victim alive. [T. 153-71] Counsel did not pursue any of the leads contained in the police file, which included polygraph test results, the victim's alienation of affection suit against Ruby Kiser, and memoranda discussing possible suspects. *Id.*

Given this strong evidence showing counsel's complete failure to pursue a viable defense, we find trial counsel ineffective for failing to investigate the plausible defense theory that Bob O'Neal committed the murder. We also find trial counsel ineffective for failing to assert this theory at trial. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland*, 466 U.S. at 690-91. Trial counsel admittedly did not know enough about this evidence to make a reasoned decision not to use it.

We similarly find Rule 37 counsel ineffective for failing to present this theory in the state post-conviction proceeding. Once again, Rule 37 counsel could not have been exercising an informed tactical judgment in failing to present this evidence. There was everything to be gained, and nothing to lose, from presenting this evidence. In *Lawrence*, we held that a tactical decision to pursue one defense does no excuse failure to present another defense that "would bolster rather than detract from" the primary defense. 900 F. 2d at 130. In *Chambers*, we held held that failure to pursue the defendant's only "realistic" defense constituted ineffectiveness. 907 F. 2d at 828-32. Henderson's Rule 37 counsel pursued trial counsel's failure to request a jury instruction and failure to make certain evidentiary objections, but did not offer the evidence heard by the district court that creates serious doubt about the reliability of Henderson's conviction. The state alleges no strategic basis for that decision, and indeed, there is none.

Rule 37 counsel's reasonable investigation of the case would have included consideration of trial testimony and the police record. It would have included conducting interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder. The Supplemental Investigation Report in the Fort Smith Police File contained leads regarding Bob O'Neal, indicating he was a suspect during the investigation. Glenda Fleetwood gave a statement to the police indicating she thought Bob O'Neal was involved. [T. 49] As relatives of the victim and perhaps the last people to see the victim alive, Glenda Fleetwood and Bob O'Neal were obvious persons for Rule 37 counsel to question.[11] There is no

[11]Contrary to the state's argument, Glenda Fleetwood did not provide an alibi for Bob O'Neal. She placed him alone with the victim in the furniture store at the time of the murder, yet counsel did not even attempt to interview her.

doubt that after a reasonable investigation, Rule 37 counsel should have been aware of the evidence implicating Bob O'Neal. The state has not challenged the veracity of the witnesses implicating O'Neal, nor has it suggested that presentation of this evidence would in any way detract from Henderson's case. Thus, we cannot help but conclude that Rule 37 counsel was ineffective for failing to raise this viable defense. *See Bliss*, 891 F. 2d at 1338 (granting writ of habeas corpus when state failed to contradict evidence supporting finding of ineffectiveness).

Having found cause, the question of prejudice need not detain us long. The record clearly supports the district court's finding of prejudice. Had the jury been aware of all the facts surrounding the murder of Willa Dean O'Neal, it would have been presented with significant doubts about Henderson's guilt. Without the evidence presented before the district court, the jury that convicted Henderson had no reason to question the inferences the state drew from its circumstantial case. This is not a case in which the evidence against the defendant is so overwhelming that ineffectiveness of counsel might be deemed harmless. There is a substantial probability that correction of constitutional error at retrial will effect a different result.

B.

Even if we could not find cause and prejudice, Henderson's claim concerning ineffective assistance of trial counsel exposes a defect at the heart of his conviction. Cause need not be shown in an "extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray*, 477 U.S. at 498; *Dugger v. Adams*, 109 S.Ct. 1211, 1217 n.6 (1989). This court applied the actual innocence exception when trial counsel proceeded with joint representation of co-defendants despite an obvious conflict of interest. *Bliss*,

891 F. 2d at 1342. The court held that one co-defendant had a defense of duress that probably would lead to her acquittal at retrial. *Id.* The Supreme Court has acknowledged that concern for avoiding a fundamental miscarriage of justice, particularly regarding ineffective assistance claims, must outweigh the principles of comity and federalism that form the basis for the procedural bar. *Carrier*, 477 U.S. at 498.

In our system of justice, a fundamental miscarriage of justice occurs when a person is found guilty of a crime even though the jury had reasonable doubt about his guilt. This premise could never be more true than in a capital case. The Supreme Court, in applying the actual innocence exception, has looked to whether correction of the constitutional error at retrial probably would result in a different outcome. *See Smith*, 477 U.S. at 538 (considering whether constitutional error served "to prevert the jury's deliberations concerning the ultimate question"); *cf. Kuhlmann v. Wilson*, 477 U.S. 436, 454 & n.17 (1986) (plurality opinion) (allowing successive habeas petition on grounds of "ends of justice" when review of all probative evidence on retrial would cause jury to have reasonable doubt).[12] This court has found that the actual innocence

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[12]The doctrinal basis for the actual innocence exception and also the "ends of justice" exception for successive habeas petitions derives at least in part from judge Friendly's frequently cited article advancing an innocence-based system for reviewing criminal convictions. Friendly, *Is Innocence Irrelevant?: Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970); *see also Smith*, 477 U.S. at 539; *Kuhlmann*, 477 U.S. at 454. Judge Friendly described the actual innocence standard as follows:

> Perhaps as good a formulation of the criterion as any is that the petitioner for collateral attack must show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, *the trier of the facts would have entertained a reasonable doubt of his guilt*.

38 U. Chi. L. Rev. at 160 (emphasis added).

exception applies if the defendant on retrial probably would be acquitted. *Edgemon v. Lockhart*, 1990 WL 209446 (8th Cir. 1990); *Byrd v. Delo*, 917 F. 2d 1037, 1043 (8th Cir. 1990); *Stokes*, 893 F. 2d at 156. The actual innocence exception applies in this case if a jury considering the evidence presented to the district court probably would not convict Henderson of capital murder. [13]

Henderson was convicted on a circumstantial case with only a piece of paper to place him at the murder scene. His alleged motive was the robbery of $41, yet the coroner testified there was no evidence of a struggle that would require the robber to kill Ms. O'Neal. In contrast, Bob O'Neal had several motives to kill his wife, had recently threatened her, owned the type of gun used in the murder, was with the victim during her last hour, made uncanny statements that indicated his involvement, and conducted himself in a bizarre and surprising manner. The total lack of effort by trial counsel to investigate and develop obvious leads implicating O'Neal precluded the development of the true facts surrounding the murder. In

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[13]Although the district court did not explicitly address the actual innocence exception, its findings suggest that the court would have found that the exception applied:

> How the jury would have reacted to such additional evidence we cannot state with any degree of certitude. But the Court can state that it would probably have been the source of some considerable mental perplexity. The natural response would be: "What is going on here?" Of course, the jury may have sorted it all out and come to the conclusion that whatever else was going on, and whoever else might have been involved, it nevertheless was convinced of the defendant's guilt beyond a reasonable doubt. On the other hand, that same evidence may have caused the jury to have a reasonable doubt as to the defendant's guilt and thereby have required his acquittal.

[T. 464-65].

light of the circumstantial case against Henderson, counsel's deficient performance causes us to have serious doubts about the reliability of his conviction. On this issue the district court's findings are substantial and compelling.

Trial counsel's efforts to investigate the facts of this case were perfunctary. Counsel did not use an investigator. [T. 134, 138] He knew Bob O'Neal was a violent person and was told by a Fort Smith police officer that O'Neal was capable of the murder, but counsel did not investigate him. [T. 154] He knew the victim had filed an alienation of affection suit against Ruby Kiser, but counsel did not investigate her. [T. 154-55] Counsel never interviewed Bob O'Neal, Glenda Fleetwood or Ricky Fleetwood, all relatives of the victim who were among the last to see her alive. [T. 161] Counsel knew that several suspects had taken polygraph tests, but he did not request the results. [T. 159] The hearing transcript shows that the investigation made by counsel essentially was limited to reading the police file on the case. [T. 155]

We agree with the district court that trial counsel's failure to adequately investigate the facts of the murder falls below the objective standard of reasonable assistance required under the Sixth Amendment. *Eldridge*, 665 F. 2d at 237. Adequate representation probably would have produced a different result. The jury that convicted Henderson knew of the circumstantial evidence implicating him, but had no reason to doubt the inferences the state drew from the facts. At retrial the jury will be confronted with substantial evidence supporting an alternative theory of the murder. It would be a fundamental miscarriage of justice to affirm Wilburn Henderson's conviction in a capital case, given the probability that a jury would have reasonable doubt about his guilt if he were tried with effective counsel.

Accordingly, we affirm the district court's grant of the writ of habeas corpus vacating Henderson's conviction.[14]

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[14]Given our decision to vacate Henderson's conviction on the guilt phase claim, it is unnecessary to review the district court's grant of the writ for ineffectiveness of counsel during the penalty phase.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1550

Wilburn H. Henderson,	*	
Appellee,	*	Order Granting
	*	Rehearing in Part.
v.	*	
	*	
Willis Sargent, Warden,	*	
Arkansas Department of	*	
Correction,	*	
Appellant.	*	

Filed: July 22, 1991

Before LAY, Chief Judge, Henley, Senior Circuit Judge, and McMillian, Circuit Judge.

The court grants in part the petition for rehearing. The court amends its earlier opinion filed February 19, 1991, as follows: The discussion within Part A of the opinion previously filed which holds Rule 37 counsel ineffective under the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and finds cause to lift the procedural bar is hereby vacated. *See Coleman v. Thompson*, 1991 WL 107399 (U.S. June 24, 1991).

All other discussion within Part A and the court's holding that the constitutional violation based on trial counsel's ineffectiveness "probably resulted in the conviction of one who is actually innocent" is reaffirmed. Accordingly the district court's grant of the writ of habeas corpus vacating Henderson's conviction is reaffirmed.

The suggestion for rehearing en banc as to the alternative holding by the panel is now hereby referred to the full court.

A true copy.

Attest:

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-1550EA

Wilburn A. Henderson, Appellee,	*	Order Denying Petition for Rehearing with Suggestion for Rehearing En Banc
v.	*	
Willis Sargent, Warden, Arkansas Department of Correction, Appellant.	*	

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Fagg, Bowman and Beam voted to grant the petition for rehearing en banc.

The petition for rehearing is also ordered denied.

August 23, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

PROCEEDINGS

THE COURT: I think I should first point out that these death penalty cases are very hard on everyone concerned. They are hard on the prosecutors, the defense attorneys, the trial court judges, the state appellate judges and the federal trial and appellate judges. I guess the reason for this is that in this country we hold life so dear. Whatever the reason, the courts have made it clear that in death cases that they are different from all other cases that appear in court. They have required a higher standard of attorney performance, for instance, than in any other type of civil or criminal litigation. And I suppose that's the way it should be.

Before dealing directly with the issues, I want to review some of the pertinent law. In the petitioner's third amended petition for writ of habeas corpus he raises 12 grounds for relief. The respondent argues that several of these claims were not raised in either petitioner's direct appeal, *Henderson v. State*, 279 Ark. 414, *cert. denied*, 464 U.S. 1012 in 1983, or

in his post-conviction relief proceedings pursuant to Arkansas Rule of Criminal Procedure 37. *See Henderson v. State*, 281 Ark. 406 in 1984.

Therefore, respondent contends that the Court is barred from reaching the merits of these new claims unless he can establish cause for his procedural default and prejudice resulting therefrom as required by *Wainwright v. Sykes*, 433 U.S. 72, 1977 case.

Although petitioner raises for the first time a number of claims that are purely issues of law, the respondent claims that the petitioner is procedurally barred from claiming that he was denied effective assistance of counsel at the guilt phase. The petitioner claims in that respect that his attorney was ineffective because of his failure to adequately investigate or determine the relevant facts of the case, the failure to interview relevant State witnesses, the failure to determine the petitioner-defendant's version of the facts of the case, the failure to investigate relevant defense witnesses to present a defense, the failure to investigate whether someone else had committed the murder, and the failure to investigate and present evidence of the petitioner's history of mental illness at the guilt phase.

Respondent also contends that the petitioner is barred from raising the claim that he was denied effective assistance of counsel at the penalty phase as well in that trial

counsel failed to adequately prepare for the penalty phase. I will discuss both of these claims later on.

Now, it should be noted in that discussion, however, that choices on whether to pursue certain investigations are dependent on the "informed strategic choices made by the defendant" as well as the information he supplied. This would appear to be critical in the petitioner's claim that Mr. Settle's failure to pursue additional leads and his refusal to develop fully petitioner's mental history was unreasonable, since it appears from the record that, while Henderson articulated a desire not to raise an insanity defense, it does not appear that he, Henderson, had the information to make an informed strategic choice concerning his use of past mental history, both as an explanation for his making of, or recantation of, the statements that he gave to the police or as mitigation at the penalty phase.

While the issue of counsel's failure to develop evidence of petitioner's mental illness was presented to the state courts, much of the testimony at this hearing the last two days concerned trial counsel's failure to present evidence of other individuals who may have had a motive or opportunity to murder Mrs. O'Neal. Much of this evidence was apparently not developed until recently and thus was not presented to the state courts.

Since the claims have not been presented to a state court, this Court must determine "if the exhaustion requirement has nonetheless been met because there are no currently available, no-futile state remedies through which petitioner can present his claim." Citing *Smittie*.

Rule 37.2 governs the availability of post-conviction relief. It provides inter alia that:

> "A petition claiming relief under this rule must be filed in circuit court or, if prior permission to proceed is necessary, in the Supreme Court within three years of the date of commitment, unless the ground for relief would render the judgment of conviction void."

Petitioner was convicted on February 2, 1982, and his appeal dismissed in 1983. Therefore, we are beyond the three-

year limitations period. And the exception to the limitations period is not applicable here since there is no contention that "judgment is a complete nullity, such as a judgment obtained in a court without jurisdiction or in violation of the double jeopardy clause." Citing *Smittie* and *Travis v. State*.

Additionally, petitioner has already had one Rule 37 petition. And the Arkansas Supreme Court has stated that a successive petition "will not be entertained unless the original petition was specifically dismissed without prejudice to filing a subsequent petition." Citing *Grooms v. State*. Since the Supreme Court did not expressly dismiss Mr. Henderson's earlier petition without prejudice, and in view of the lapse of time since his commitment, petitioner has met the federal exhaustion requirement.

The next step in the procedural default analysis requires the Court to determine whether petitioner can show cause for failing to bring his claims in state court.

The Supreme Court has not yet given the term "cause" precise content nor "essayed a comprehensive catalog of the circumstances that would justify a finding of cause." *Smith v. Murray*, 106 S.Ct. 2661, 1986 case. However, the Court has stated generally that a petitioner may establish cause by demonstrating that either trial or appellate counsel's ineffective assistance was the cause of the default. In that regard, counsel's decision to forego raising a claim must not be

the result of a strategic, tactical or sandbagging choice, since it is the possibility of sandbagging that is the principal reason for the procedural default doctrine.

> I quote from Murray where it is said: "The question of cause for procedural default does not turn on whether counsel erred or the kind of error counsel may have made. So long as the defendant is represented by counsel whose performance is not constitutionally ineffective under the standard in *Strickland v. Washington*, we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."

In the present case, the factor which caused the procedural default was the failure of counsel to investigate and develop evidence that was brought before the Court at this hearing.

The last hurdle petitioner must pass in order to avoid procedural bar to bringing his claims now is that he must show actual prejudice to his defense resulting from the state court's failure to address the merits of the claim. Citing *Smittie v. Lockhart*. In other words, the error must work to the petitioner's actual and substantial disadvantage. Citing *United States v. Frady*.

In this case, it cannot be said that counsel's failure to investigate fully his innocence defense, or his history of

mental illness, and the consequent inability of the state courts to evaluate such information was insubstantial. Petitioner has met both the cause and prejudice prongs of the procedural default doctrine.

This will become more apparent, I believe, in the discussion of the guilt phase issues below.

Petitioner attacks in this case the effectiveness of his counsel at the guilt phase as well as at the penalty phase. More particularly he contends that this attorney did not adequately investigate the case to determine all relevant facts and effectively did not investigate the leads which pointed to the possibility that one or more other persons committed, or were involved in the commission, of the crime. He also contends that his attorney was ineffective in not investigating, developing, and utilizing the information available about his mental illness history during the guilt phase of the trial. Much of that we have already discussed.

The Court has heard the testimony of Robert O'Neal, Glenda Fleetwood, Ricky Fleetwood, Clarence Wilson, Irene Hudspeth, Dr. Haydee Kort, Dr. Robert Showalter, Joe Lee, Alonzo Kennon, Vivian Reather, Ruby Kiser, and Violet Wilson, in addition to certain of the defense witnesses -- of the State's witnesses.

The court must ask itself: What might have been the result had the jury heard such testimony at the trial back in

1982? Would that testimony have raised a reasonable doubt in the minds of the jurors as to the guilt of the petitioner?

It is clear to the Court that there was sufficient evidence to support the jury's finding of the petitioner's guilt of the crime charged beyond a reasonable doubt. The State developed a motive for the robbery: money. It produced the yellow sheet of paper that the defendant acknowledged was his and upon which he had drawn the floor plan of the cabin on Beaver Lake and which had the telephone numbers of the real estate agent. It proved that the defendant had fled the jurisdiction and had made statements to others intended to throw the police off his trail. He gave a statement to the police acknowledging his presence at the scene at the time of the commission of the crime and acknowledging that his gun had been used in the commission of the crime. And it had corroborating evidence of his withdrawing the gun from pawn a few days before the murder and again pawning it shortly after the murder. In sum, it proved the motive, opportunity and ability to commit the crime. The petitioner may well be guilty of that crime as charged, but that it is not the question here.

The question here is whether the defendant received the effective representation of an attorney as required by the Sixth Amendment of the Constitution.

Frankly, the testimony of the witnesses that I have enumerated above has left the Court puzzled as to the possible

involvement of Mr. Robert O'Neal, Mr. Ollie Brown, and Mr. John Hysell.

Mr. Henderson chose to defend this case on a straight-forward theory. He says, in effect, "I did not do it. I was not in Fort Smith on the day of the murder. I had no connection with it."

Whether that is true or not is also irrelevant to the issues before the Court. This is the position he took with his attorney and, indeed, the attorney felt it was a viable defense and he pursued it with evidence that the defendant was in Springdale, Arkansas between noon and 12:30 on the day of the murder; that the weather was bad and the traffic particularly bad because of the Thanksgiving recess for the University students at Fayetteville; and that it was practically impossible for Mr. Henderson to have driven from his home to the murder site in time to commit the murder which occurred very close to 2:00 p.m. on November 26, 1980.

It would obviously be very consistent with this defense to show that one or more other persons had the motive, ability, and opportunity to commit the murder. Such evidence has been rather dramatically developed here over the last two days. How the jury would have reacted to such additional evidence we cannot state with any degree of certitude. But the Court can state that it would probably have been the source of some considerable mental perplexity. The natural response would

be: "What is going on here?" Of course, the jury may have sorted it all out and come to the conclusion that whatever else was going on, and whoever else might have been involved, it nevertheless was convinced of the defendant's guilt beyond a reasonable doubt. On the other hand, that same evidence may have caused the jury to have a reasonable doubt as to the defendant's guilt and thereby have required his acquittal.

It is not necessary for me to detail all the pertinent evidence on this point, but I will review some of it to make the point.

Let's take the potential involvement of Mr. Robert O'Neal. There was the testimony that, contrary to his usual practice, he required Glenda Fleetwood to work with him on the date of the murder rather than to stay at the store and work with his wife, as was her custom;

That he spoke that morning about where his wife wanted to be buried;

That when he and the Fleetwoods were leaving the store at about 1:40 he returned to the store for about five to seven minutes while the Fleetwoods remained outside by the car;

That Mr. O'Neal directed Glenda Fleetwood to return to the store immediately after they got to the house they were tearing down to get a rootbeer for him so he could take some medicine;

That when she returned with a cold drink from some

other source, he immediately instructed her to go back to the store to get some electrician's clippers or tape;

That when she returned from the murder scene with the police in an agitated state, Mr. O'Neal blurted out something like, "Someone has robbed and killed my wife;"

That he wanted a divorce from his wife but did not want her to get the property;

That he would be the beneficiary of some $30,000.00 worth of life insurance;

That he was violent and mentally unstable;

That he had a .22 pistol that was stolen sometime after the murder.

And there are other factors involving his relationship to other people, like Ms. Kiser, Ms. Reather.

Ollie Brown. We have Mr. Henderson's statement to the police implicating him directly as the murderer. We have evidence of Mr. Henderson's prior close association with Mr. Ollie Brown. We have that strange 1979 conviction that almost accidentally, it seems to me, came before the Court involving Mr. Henderson's paying Mr. Brown to have sex with his wife so he could be photographed in the presence of a child. And we have the gambling background in which the two apparently have been involved in gambling activities.

All of this would have been at least consistent with the statement given by Henderson to the police. In other words,

the fact that he's denying giving it, denying its truthfulness does not prevent the jury from considering that statement and considering the potential truth of some, or all, of it. And it does appear that they did rely upon the truth of some of it, while disregarding the truth of other parts.

Then the strange story about Mr. Hysell. It appears when a composite drawing of the suspect in this case was put out on TV and radio, that promptly a pawnbroker here in Fort Smith contacted the police to state that the person had just pawned some jewelry with him. It turned out to be this Mr. Hysell, who apparently had just robbed some store in Kansas a few days before, or the day before. And Mr. Lee, when he sees the photograph, immediately identifies him -- that is, Mr. Hysell -- who, I think he said he had been -- what was it? The ex-sister-in-law? What was the relationship that Mr. Lee stated Mr. Hysell had to his sister-in-law?

MR. COLEMAN: Mr. Lee's brother was married to Mrs. O'Neal and at that time they went to visit in Kansas, his brother and Mrs. O'Neal knew Hysell and they had mentioned his name or he had met Mr. Hysell in Kansas.

THE COURT: And there is in the record, if one will note, a long criminal record of Mr. Hysell for crimes of armed robbery. And, you know, just the chance or the coincidence or the likelihood of such a coincidence of someone who had known the decedent and whose relatives lived next door to her in

Kansas ended up in Fort Smith on about the date of the murder and was known to be a person of violent tendencies and a robber, is, you know, something -- the question of how that might affect the jury we don't know, but it was there to be developed and presented to the jury.

It is my view that what I have detailed here does indicate ineffectiveness of counsel at both guilt and penalty phases of the trial. And I say this without wanting to be too hard on anyone. As I have already stated when I first started out, the courts have evolved a standard of performance for attorneys in a death case that is higher than any other standard imposed on any attorney for any other type of litigation. And it is clear to the Court that the attorney's performance fell short of the standard in this case and that the petitioner was prejudiced thereby. Whether it will result in any different outcome is not something that this Court has to deal with and must not deal with.

The effects of the Court's findings and rulings are obvious. The conviction and sentence of the defendant must be set aside, and then the State will be given 90 days within which to decide if it wishes to retry to Mr. Henderson. If the decision is to retry him, that trial must begin, unless continued by the state court, within 150 days of the entry of the Order, which presumably will be today or Monday.

It's always difficult in these cases. The procedures are so -- in which these issues can be raised so many years after the state trial are a source of much controversy and debate and in many cases prosecutors find themselves greatly prejudiced by the passage of time, the death and disappearance of witnesses and other evidence. It does not appear in this case, looking at the record, that there are any substantial problems in that connection because of the nature of the evidence that was presented to sustain the conviction and obtain the conviction of the petitioner.

But in any event, it's the State's decision, under these circumstances, as to whether it wishes to proceed. I am not going to release petitioner on the basis of this ruling until the expiration of the time limits mentioned, and so no order will be made to that effect. He is technically, I guess you might say, in the same posture he was in when he was arrested. He would not be subject to bail under Arkansas law having been arrested for a capital crime. But I would request the State to make the decisions that are called for here at the earliest possible moment so that the matter can be disposed of one way or another and terminated.

Court will be in recess.

(At 1:10 p.m. the above-entitled proceedings were concluded.)

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Supreme Court, U.S.
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No. 91-792

In The
Supreme Court of the United States
October Term, 1991

WILLIS SARGENT, WARDEN
ARKANSAS DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

WILBURN A. HENDERSON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE BY THE STATE OF MISSOURI

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QUESTION PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DETERMINATION REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT IS CORRECT?

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INTEREST OF AMICUS CURIAE

It is apparent from the cases that have been discussed in the petition for writ of certiorari filed by the State of Arkansas and the cases to be discussed in this brief, that the issue of how the "probable actual innocence" exception to the "cause" requirement of this Court's procedural default jurisprudence applies to the guilt-phases of capital sentencing proceedings is in need of clarification by this Court. The interest of the State of Missouri is founded on the fact that the United States Court of Appeals for the Eighth Circuit is considering several habeas corpus cases involving guilt-phase allegations that are subject to adequate and independent state procedural bars.

The State of Missouri's interest is both substantial and continuing.

SUMMARY OF THE ARGUMENT

In the case at bar, the United States Court of Appeals for the Eighth Circuit has affirmed the grant of a writ of habeas corpus to respondent, Wilburn A. Henderson. In so doing, the court has misapplied the "probable actual innocence" exception to this Court's procedural default jurisprudence. The court's application of this very powerful doctrine is inconsistent with opinions from this Court and other Circuit Courts of Appeals. Certiorari review is necessary, in this case, to establish an objective exception for use in federal habeas corpus actions.

ARGUMENT

I.

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S DETERMINATION REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT DOES NOT COMPORT WITH THIS COURT'S PROCEDURAL DEFAULT JURISPRUDENCE.

Respondent, Wilburn A. Henderson, was convicted of murdering a Fort Smith, Arkansas furniture store owner during a robbery. Respondent was sentenced to death by a jury. The Supreme Court of Arkansas affirmed Henderson's judgment of conviction and sentence of death. **Henderson v. State**, 279 Ark. 414, 652 S.W.2d 26 (1983). This Court denied certiorari review. **Henderson v. Arkansas**, 464 U.S. 1012 (1983).

Henderson was then denied relief pursuant to Arkansas Rule of Criminal Procedure 37. **Henderson v. State**, 281 Ark. 406, 664 S.W.2d 451 (1984). Thereafter, respondent petitioned the United States District Court for Eastern District

of Arkansas for a writ of habeas corpus. The district court granted relief on allegations of ineffective assistance of counsel during both the guilt and sentencing phases of respondent's bifurcated criminal trial.

Petitioner appealed that determination to the Eighth Circuit Court of Appeals, which initially affirmed the granting of habeas corpus relief on the guilt-phase claim. **Henderson v. Sargent**, 926 F.2d 706, 707 (8th Cir. 1991).[1] The court noted the guilt-phase claim was procedurally defaulted in the Arkansas courts but that respondent could overcome the default because he was able to demonstrate both cause and actual prejudice. Id., at 708-713. The Eighth Circuit found the respondent had demonstrated legally sufficient "cause" because he had recieved ineffective assistance of post-conviction counsel. Id., at 712[5]. After finding cause to

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[1] The Court of Appeals stated it would not "reach the penalty phase claim." **Henderson v. Sargent**, 926 F.2d at 707.

overcome the default, the court did not need much time to find actual prejudice. Id., at 712-713 ("[h]aving found cause, the question of prejudice need not detain us long").[2]

Finally, and most importantly for the purposes of the petition for writ of certiorari, the court also found the procedural default could be excused because respondent had demonstrated that he was probably actually innocent of the charge of capital murder. Id., at 713-714. In the initial opinion, filed February 19, 1991, this finding was only dicta. It was not until the granting of rehearing in part by the panel, **Henderson v. Sargent**, 939 F.2d 586 (8th Cir. 1991), that the dicta became the holding upon which relief was granted. In granting rehearing in part, the court, relying on the

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[2] Although amicus feels that the court also misapplied the actual prejudice test, see **United States v. Frady**, 456 U.S. 152 (1982), that issue will not be discussed as the determination is insignificant because the Eighth Circuit vacated its finding of cause in light of **Coleman v. Thompson**, 111 S.Ct. 2546 (1991). See **Henderson v. Sargent**, 939 F.2d 586 (8th Cir. 1991).

intervening opinion of this Court in **Coleman v. Thompson**, 111 S.Ct. 2546 (1991), vacated its previous finding of cause. **Henderson v. Sargent**, 939 F.2d at 586.

The determination of the Eighth Circuit regarding "probable actual innocence" does not comport with the decisions of this Court on that issue. The opinion also is significant in that it is a major portion of what now is a real conflict in application of this test in the courts of appeals. Compare **Henderson v. Sargent**, 926 F.2d at 713-714 with **Johnson v. Singletary**, 938 F.2d 1166 (11th Cir. 1991)(en banc). This Court should accept certiorari review of this case to provide further guidance to the federal courts as to the limited nature of the "probable actual innocence" exception to the cause requirement of **Wainwright v. Sykes**, 433 U.S. 72 (1977). **Dugger v. Adams**, 489 U.S. 401, 410, n.6 (1989); **Murray v. Carrier**, 477 U.S. 478, 496 (1986). This case also provides this Court with an excellent opportunity to resolve the very real conflict between the circuits in

discussing this exception.[3]

Very recently, in **Sawyer v. Whitley**, 112 S.Ct. ___, No. 91-6382 (U.S. Nov. 14, 1991), this Court granted certiorari review on a question involving the application of the probable actual innocence exception to the sentencing phase of a capital murder proceeding. The present case would make an excellent companion case for review. By accepting this case, the Court could concisely address the probable actual innocence exception as it applies to both sentencing proceedings, **Sawyer**, and guilt proceedings, **Henderson**.

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[3] In addition to the conflict mentioned above, a conflict has developed in the circuits regarding application of the probable actual innocence test to the sentencing proceeding of a capital murder proceeding. Compare **Johnson v. Singletary**, 938 F.2d at 1185-1186 and **Sawyer v. Whitley**, 945 F.2d 812, 820 (5th Cir.), cert. granted 112 S.Ct. ___, No. 91-6382 (U.S. Nov. 14, 1991) with **Deutscher v. Whitley**, ___ F.2d ___, Nos. 88-2552, 88-2579 (9th Cir., October 15, 1991) and **Stokes v. Armontrout**, 893 F.2d 152, 156 (8th Cir. 1989), stay denied, 110 S.Ct. 2162 (1990). By accepting this case and considering it in tandem with **Sawyer**, supra, the Court can tailor narrow definitions of the exception which would apply equally to the guilt and sentencing phases of criminal proceedings.

The Application of Probable Actual Innocence to Excuse an Adequate and Independent State Procedural Default

In 1977, this Court expanded on its holding in **Francis v. Henderson**, 425 U.S. 536 (1976), determining that a federal constitutional allegation brought in a habeas corpus petition pursuant to 28 U.S.C. Section 2254 could not be considered on its merits if the petitioner had not provided the appropriate state court with an opportunity to correct the constitutional violation. **Wainwright v. Sykes**, 433 U.S. 72 (1977). Under that circumstance, the Court determined that it would be the petitioner's obligation to demonstrate sufficient cause and actual prejudice to overcome the resulting procedural bar if review on the merits was to occur. Id., at 87, 90-91.[4]

The two-part test of **Francis** and **Sykes** significantly

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[4] See also **Davis v. United States**, 411 U.S. 233 (1973) (establishing the "cause and actual prejudice" test for federal prisoners litigating under 28 U.S.C. Section 2255).

modified the previous "deliberate bypass" standard of **Fay v. Noia**, 372 U.S. 391 (1963).[5] It relieved the burden of the state's to demonstrate that a petitioner's claim was procedurally defaulted and correctly placed that burden on the criminal inmates. The **Sykes** standard also eliminated **Fay's** "presumption in favor of federal habeas review of claims procedurally defaulted in state court." **Coleman v. Thompson**, 111 S.Ct at 2562.

Later, in **Engle v. Isaac**, 456 U.S. 107 (1982), it was noted "that the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct a 'fundamental miscarriage of justice.'" **Coleman**, 111 S.Ct. at 2564, quoting **Engle v. Isaac**, 456 U.S. at 135. The fundamental miscarriage of justice standard was again discussed in **Murray v. Carrier**, 477 U.S. 478

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[5] The **Fay** standard of deliberate bypass was expressly overruled in this Court's last term. **Coleman v. Thompson**, 111 S.Ct. 2546, 2564-2565 (1991).

(1986), when the Court noted the exception to the "cause" requirement should come into play only "in an extraordinary case." Id., at 496;[6] **Dugger v. Adams**, 489 U.S. at 410, n. 6; see also **Harris v. Reed**, 489 U.S. 255, 270-271 (1989)(O'Connor, J., concurring)(limiting this exception to the status of a "'safety valve' for the 'extraordinary case' where a substantial claim of factual innocence in precluded by an inability to show cause").

This Court has not formulated any precise definition allowing for consistent application of this very powerful exception. See **Johnson v. Singletary**, 938 F.2d at 1189

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[6] In **Carrier**, the exception was articulated as follows:

> where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Murray v. Carrier, 477 U.S. at 496; see **Smith v. Murray**, 477 U.S. 527, 538-539 (1986); **Harris v. Reed**, 489 U.S. 255, 270-271 (1989)(O'Connor, J., concurring).

(Tjoflat, C.J., concurring in part, dissenting in part)("[a]ctual innocence is not, on its face, a completely clear concept, even in the guilt/innocence context").[7] This is an area needing attention from this Court.

The Probable Actual Innocence Exception as Applied in the Eighth Circuit

As the instant case illustrates, the exception is applied by the Eighth Circuit in more than the "extraordinary case." Since this Court's writings on the exception in **Engle** and **Carrier**, state prisoners have been found probably actually

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[7] Several courts have suggested that the most revealing discussion from this Court came in **Kuhlmann v. Wilson**, 477 U.S. 436, 454 (1986)(plurality opinion). **Johnson v. Singletary**, 938 F.2d at 1184 (majority opinion); id., at 1189 (Tjoflat, C.J., concurring in part, dissenting in part); id., at 1196 (Anderson, J., concurring in part, dissenting in part); **Sawyer v. Whitley**, 945 F.2d at 816-817. **Kuhlmann** was a successive petition case under 28 U.S.C. Section 2254, Rule 9(b) and the plurality termed the exception as one based upon a "colorable showing of factual innocence." **Kuhlmann**, 477 U.S. at 454. It appears that the test of **Kuhlmann** is compatible with the "probable actual innocence" test. See **McCleskey v. Zant**, 111 S.Ct. 1454, 1470-1471 (1991)(discussing **Kuhlmann** in the same context as **Murray v. Carrier**).

innocent of the crime or sentence in at least four cases. **Henderson v. Sargent**, 926 F.2d 706 (8th Cir.), reh'g granted in part 939 F.2d 586 (8th Cir. 1991); **Pilchak v. Camper**, 935 F.2d 145 (8th Cir. 1991); **Jones v. State of Arkansas**, 929 F.2d 375 (8th Cir. 1991); and **Bliss v. Lockhart**, 891 F.2d 1335 (8th Cir. 1989).

Interestingly, two of the opinions have been authored by the Chief Judge of the Court. See **Henderson** and **Jones**. It is readily apparent that Chief Judge Lay's view of probable actual innocence is at odds with this Court's discussions in **Engle**; **Carrier**; and **Smith**. The Chief Judge has not been shy with his discussion of the exception. See Lay, The Constitution, the Supreme Court, and Mr. Meese: Habeas Corpus and the Doctrine of Original Intent, 4 Det.C.L.Rev. 983 (1986). In that article Judge Lay remarked that "[o]ne positive step occurred last term in **Murray v. Carrier**, when Justice O'Connor suggested that a state prisoner who asserts innocence in his claim will not be hampered by the

procedural requirements barring federal court review of the merits of this case." Id., at 991. Judge Lay has also voiced his opinion in the judicial arena. **Fairchild v. Lockhart**, 900 F.2d 1292, 1299 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), cert. denied, 111 S.Ct. 20 (1990); **Gilmore v. Armontrout**, 867 F.2d 1179, 1180 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), cert. denied, 490 U.S. 1114 (1989); **Stokes v. Armontrout**, 901 F.2d 1460 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), stay denied, 110 S.Ct. 2162 (1990); **Byrd v. Delo**, 942 F.2d 1226, 1233-1234 (8th Cir.)(Lay, C.J., dissenting from denial of petition for rehearing en banc), stay denied, 112 S.Ct. 17 (1991).

A close review of the chief judge's writings reveals that Chief Judge Lay is applying more a of "fundamental fairness" test in his determinations. This revelation is evidenced by the judge's comments to Congress on the

proposed habeas corpus legislation recently drafted. In discussing his feelings on the determination of successive petitions, Judge Lay opined:

> Second, the proposal indicates that a constitutional attack on the process at trial must include a claim of factual innocence. Here again, proof of a fundamental constitutional defect in the trial or sentencing should suffice as a basis for a successive petition, without need to also cast doubt on the jury's determination of guilt. It is not clear what federal interest is served by interposing a procedural bar to defeat the right of an inmate who is able to show a constitutional defect in his trial or sentencing.

Lay, Statement of Chief Judge Donald P. Lay, Eighth Circuit Court of Appeals, Before the Senate Judiciary Committee In Re: Habeas Corpus Reform in Capital Cases, 19 Cap.U.L.Rev. 659, 668 (1990)(emphasis added).[8] While the comments were directed toward successive litigation, it is apparent the thoughts take a high priority in Judge Lay's determination of initial petitions. **Henderson v. Sargent**, 926

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[8] Hereinafter referred to as "Statement."

F.2d at 713-714.

Judge Lay's test is akin to that discussed by Justice Stevens in his dissenting opinion in **Smith v. Murray**, 477 U.S. 527, 541-544 (1986)(Stevens, J., dissenting).[9] That view was expressly rejected by the majority. **Smith**, 477 U.S. at 538-539. In a similar fashion this Court should accept certiorari review of this case and reject Chief Judge Lay's disguised "fundamental fairness" analysis present in this case and others.

Pragmatically, the exception is extremely unworkable in habeas corpus actions. As was shown supra, the Eighth Circuit has had a difficult time in applying what would be an

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[9] In actuality, Judge Lay's analysis and comments appear to be even broader than those expressed by Justice Stevens in **Smith**. Judge Lay would apply the test to any apparent constitutional violation, even those barred by the dictates of cases such as **Stone v. Powell**, 428 U.S. 465 (1976). Judge Lay has interpreted **Smith v. Murray**, supra, as stating "if the claims ... affected the guilt determination or undermined the sentencing process in an unconstitutional manner" they would have to be reviewed on their merits. See Statement, 19 Cap.U.L.Rev. at 665, 668.

objective use of the exception. **Pilchak v. Camper**, 935 F.2d at 149. In fact, in **Pilchak** the court was so determined to grant relief that after overlooking the cause and actual prejudice analysis of **Sykes**, it cautioned readers that the opinion should not be cited as precedent allowing an "end run around the cause-prejudice requirements enacted by the Supreme Court and this opinion should not be considered precedent for such an approach." Id., at 149.

Chief Judge Lay has had no problem using the case as precedent. **Byrd v. Delo**, 942 F.2d at 1233.[10] The writing is

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[10] In **Byrd**, the judge who authored the panel opinion (Circuit Judge Arnold) and the judge who authored the **Pilchak** opinion (Circuit Judge Beam) joined in a statement concurring in the denial of rehearing en banc. **Byrd**, 942 F.2d at 1234-1235. In that statement, the judges suggested that the difference between the **Pilchak** and the **Byrd** cases was the difference in the number of constitutional claims. **Byrd**, 942 F.2d at 1234-1235. Even this analysis appears to be one of "fundamental fairness" and not a true application of the probable actual innocence exception. A second distinction listed is that the constitutional violation in **Pilchak** led to the imposition of a sentence that would not otherwise have been imposed. Id., at 1234. Again, such analysis appears to be based on "fundamental fairness."

on the wall that the **Pilchak** opinion will be developed as valid authority in the Eighth Circuit. This erroneous application of the probable actual innocence exception should be preempted immediately.

Other Circuit Courts of Appeals have also had a difficult time applying the exception. In **Johnson v. Singletary**, 938 F.2d at 1175-1183, 1185-1186, the Eleventh Circuit considered the exception. Id. The majority of the court struggled to develop a workable application of the exception. Id. The case provided five dissenting votes. Id., at 1186 (Tjoflat, C.J., concurring in part, dissenting in part); id., at 1196 (Anderson, J., concurring in part, dissenting in part, joined by Kravitch, Johnson and Clark, JJ.).[11] The **Johnson**

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[11] Judge Anderson relied on Eighth Circuit cases, including the case at bar, in developing his dissent to the non-application of the exception. **Johnson**, 938 F.2d at 1199, citing **Stokes v. Armontrout**, 893 F.2d 152, 156 (8th Cir. 1989), stay denied, 110 S.Ct. 2162 (1990); **Smith v. Armontrout**, 888 F.2d 530, 545 (8th Cir. 1989), stay denied, 110 S.Ct. 830 (1990); **Henderson v. Sargent**, 926 F.2d 706 (8th Cir. 1991).

case alone demonstrates that the exception borders on being unworkable. Judge Anderson even noted that in over 100 cases which had considered the exception since **Smith v. Murray** was decided, "[m]ost ... have merely concluded in a rather summary manner that the miscarriage of justice standard was not satisfied." **Johnson**, 938 F.2d at 1199 (Anderson, J., concurring in part, dissenting in part).

In **Hollis v. Davis**, 941 F.2d 1471 (11th Cir. 1991), the court discusses as interchangable the prejudice standards of **United States v. Frady**, 456 U.S. 152, 170 (1982), the **Strickland** standard, **Strickland v. Washington**, 466 U.S. 668, 694 (1984) and the probable actual innocence standard of **Murray v. Carrier**, 477 U.S. at 495. See **Hollis v. Davis**, 941 F.2d at 1483. The unworkability of the exception is seen in other writings. See **Deutscher v. Whitley**, ___ F.2d ___, Nos. 88-2552, 88-2579 (9th Cir. Oct. 15, 1991); **Sawyer v. Whitley**, 945 F.2d 812, 820 (5th Cir.), cert. granted 112 S.Ct. ___, No. 91-6382 (U.S. Nov. 14, 1991).

Perhaps this Court should re-evaluate whether the exception should be available under any circumstance. In most instances, individual states have procedures available for granting relief if the inmate can demonstrate that he is probably actually innocent of the charges or sentence. This remedy would lie, generally, through the use of some form of executive clemency. See generally Mo.Const. art. IV, section 7; Mo.Rev.Stat. sections 217.800, 552.070, 549.010 et. seq. (1986); Ark.Const. art. 6, section 18; Ark.Stat.Ann. section 16-93-204 (1991 Cum.Supp.); Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners 76 Harv.L.Rev. 441, 525-526 (1963).

The executive remedy works in practice as well as in theory. Recently, Governor L. Douglas Wilder of the State of Virginia granted an executive pardon to Joseph M. Giarratano. See The New York Times, February 20, 1991, at 16, col. 4; The Wall Street Journal, February 20, 1991, at 4, col. 2. Mr. Giarratano, at the time of the pardon, had

completed the entire litigation process and was nearing execution.[12] If Mr. Giarratano would have had an incentive to utilize executive remedies prior to the more "traditional" judicial remedies, much time and expense may have been better spent. This aspect is best demonstrated, perhaps, by the litigation of William Neal Moore. After several years of litigation--including at least five decisions by this Court in federal habeas corpus actions--Mr Moore was granted clemency by the State of Georgia Board of Pardons and Paroles. See The New York Times, August 22, 1990, at 1, col. 2. Again much in the way of judicial time and resources were expended in deciding Mr. Moore's initial allegations.

This Court should take this opportunity to discuss the scope and application of executive remedies as a very viable alternative to the probable actual innocence exception.

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[12] This Court is familiar with Mr. Giarratano. **Murray v. Giarratano**, 492 U.S. 1 (1989).

Application of the Exception to Respondent's Case

The application of the probable actual innocence exception to respondent's habeas corpus litigation is the primary focus of the petition for writ of certiorari filed in this case by petitioner. Amicus curiae will defer to the discussion presented in the petition. It should be clear, though, that the United States Court of Appeals has applied a "fundamental fairness" exception in this case.

The powerful probable actual innocence exception to an independent and adequate state procedural default is receiving ever-broadening application in the Circuit Courts of Appeals. This Court should use this case, in conjunction with **Sawyer v. Whitley**, supra, to provide objective guidance on this exception--with respect to both guilt and sentencing proceedings--to the federal bench. This Court should grant the petition and issue a writ of certiorari to the Eighth Circuit.

CONCLUSION

WHEREFORE, for the reasons stated in the petition for writ of certiorari and in this amicus brief, a writ of certiorari should be issued to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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EDITOR'S NOTE

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91-792 (3)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIS SARGENT, WARDEN,
ARKANSAS DEPARTMENT OF CORRECTION
PETITIONER

V.

WILBURN A. HENDERSON
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNTIED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorney for the Respondent

STATEMENT OF THE CASE

After the respondent was convicted by a jury in Sebastian County, Arkansas, of capital murder and sentenced to death, his direct appeal was denied and his Petition for Post-Conviction Relief was also denied by the Arkansas Supreme Court, Henderson v. State, 281 Ark. 406, 664 S.W.2d 451 (1984).

Respondent filed his Petition for Writ of Habeas Corpus claiming ineffective assistance of counsel at the penalty phase and at the guilt/innocence phase. The issue of ineffective assistance at the guilt/innocence phase had not been raised on direct appeal or through the post-conviction petition to the State court.

The United States District Court for the Eastern District of Arkansas found that respondent had been denied effective assistance of counsel at both the penalty phase and the guilt/innocence phase. The District Court and the Eighth Circuit both held that the cause requirement for procedural default was met by ineffective assistance of counsel at the post-conviction phase. The Eighth Circuit Court of Appeals also specifically held that, even if cause where not established by ineffective assistance of post-conviction counsel, respondent was probably factually innocent of the charge, and affirmed the granting of the writ.

The Eighth Circuit Court of Appeals made a finding of the fact of actual innocence based upon a great deal of evidence which they found pointed to the victim's husband as the actual killer. This evidence included numerous statements that he knew his wife was dead before her body was discovered, the fact that he was the last

person known to have seen her alive, and that he had the means, motive and opportunity to murder his wife. This case is set for retrial on the merits on January 21, 1992, and respondent requests that the court deny the State's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari filed herein by the State of Arkansas should be denied because Henderson met the standard for "actual innocence" established by this Court in Murray v. Carrier, 477 U.S. 478 (1986). There is no confusion among the circuits as to the meaning of the term "actual innocence" in the guilt/innocence phase.

THE DETERMINATION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT REGARDING ACTUAL INNOCENCE TO OVERCOME PROCEDURAL DEFAULT IS CORRECT

In Murray v. Carrier, 477 U.S. 478, 496 (1986), this Court stated that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas corpus court may grant the writ even in the absence of a showing of cause for the procedural default." It is difficult to imagine a clearer example than the instant case for the application of this exception. Substantial evidence was presented by the respondent at his habeas hearing to support his claim that he did not commit the crime for which he was convicted, that this evidence, although available to trial counsel, was not investigated or utilized by counsel, and that such ineffective assistance resulted in his wrongful conviction.

Respondent's claim was never based upon mere "legal" innocence, but addressed the ultimate issue of factual innocence. Petitioner's statement that "Henderson indeed may have a legal claim to put before the jury, but that in no way meets the standard as announced," is erroneous. Petitioner appears to be arguing that the defendant should be required to prove his innocence beyond a reasonable doubt in order to excuse procedural default on the grounds of actual innocence; such a standard is not obtainable in any case, particularly a habeas corpus action.

Similarly, the assertion by the petitioner that the Eighth Circuit found that the respondent was actually innocent because "other suspect" evidence was not presented, and that the court thus only applied the prejudice prong of the test set out in Wainwright

v. Sykes, 433 U.S. 72 (1977), is also a misstatement. The Eighth Circuit specifically found that, because defense counsel fell so far below the "objective standard of reasonableness" required by Sykes, the reliability of the entire conviction was questionable, and the jury, given these facts, would very likely have acquitted respondent. In other words, the respondent was probably actually innocent, but, because of the ineffectiveness of his counsel, he was convicted anyway.

In addition, petitioner's assertion that "nothing could be shown even at the habeas hearing that could connect the husband to the murder," is far from accurate. Both the United States District Court and the Eighth Circuit Court of Appeals commented upon the strength and the abundance of the evidence, presented at the habeas hearing, which strongly implicated the victim's husband in her murder. This case is clearly distinguishable from cases such as Coleman v. O'Leary, 825 F.2d 696 (7th Cir. 1988), cited by petitioner in its brief, in which there was overwhelming evidence of the guilt of the defendant. The only evidence against the respondent was a piece of paper left at the crime scene, and the respondent's statement, later recanted, that he had been at the store and saw who actually committed the murder. The Eighth Circuit and the District Court also pointed to the abundant evidence of the respondent's history of mental illness which should have been used to explain why respondent made such a statement.

Finally, petitioner cites several cases, among them Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990), Clark v. Dugger, 901 F.2d 908 (11th Cir. 1990), and Aldridge v. Dugger, 925 F.2d 1320 (11th

Cir. 1991), in support of its proposition that this Court should decide to hear this case because the circuits are in disagreement regarding the meaning and application of the "actual innocence" standard. Unfortunately, none of the cases cited supports that thesis. Each of these cases involves the reliability of the imposition of the death penalty upon the particular defendant. If anything, these cases have in common a confusion over how the "actual innocence" standard should be extended to the sentencing phase, and this is simply not an issue in the instant case. Furthermore, all of the cases cited by the petitioner are from the same circuit; this hardly demonstrates widespread disagreement and confusion among the circuits. The courts do not appear to have any difficulty defining actual innocence in the guilt/innocence phase. This Court has properly declined to narrowly define that term, leaving such definition to common sense and the plain meaning of the words.

CONCLUSION

Respondent therefore requests that this Court deny the Petition for Writ of Certiorari filed herein by the State of Arkansas.

BY: _____

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he has served a copy of the above foregoing, attached and annexed instrument or pleading on all parties hereto by depositing a copy thereof in the United States Mail, postage prepaid, addressed as follows:

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This service affected this 11th day of December, 1991.

Gerald A. Coleman